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No. ____

IN THE
Supreme Court of the United States
October Term, 1990

RICHARD L. DUGGER, Secretary
Florida Department of Corrections,
Petitioner,

vs.

JOHN T. TUKES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER *STONE V. POWELL*, WHICH PRECLUDES CONSIDERATION OF FOURTH AMENDMENT CLAIMS IN HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C § 2254, REQUIRES AS A PREREQUISITE TO THE BAR AGAINST CONSIDERING FOURTH AMENDMENT CLAIMS, THAT STATE TRIAL COURTS MAKE EXPLICIT FACTUAL FINDINGS, IN ADDITION TO THE PRONOUNCED FINDING REGARDING THE VALIDITY OF THE SEARCH.

WHETHER *STONE V. POWELL* REQUIRES, AS A PREREQUISITE TO THE BAR AGAINST CONSIDERING FOURTH AMENDMENT CLAIMS, THAT STATE APPELLATE COURTS NOT SUMMARILY AFFIRM STATE TRIAL COURT RULINGS ON FOURTH AMENDMENT CLAIMS.

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OPINION BELOW

The opinion of the lower court is reported as *Tukes v. Dugger,* 911 F.2d 508 (11th Cir. 1990). (Pet. App. 19-40).

JURISDICTION

This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> Section 1 ... nor shall any State deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 2254 provides:

> **§ 2254. State custody; remedies in Federal courts**
>
> (a) The Supreme court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State

corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

Respondent, John Tukes, was charged by information with two counts of first degree murder, armed burglary, and possession of a firearm during the commission of a felony, in the Eleventh Judicial Circuit, Dade County, Florida. Prior to trial, Tukes filed a Motion to Suppress Evidence. (Pet. App. 1-3). The motion alleged that various items, including a pistol and ammunition, were seized from Tukes' residence in violation of Tukes' Fourth Amendment rights. (Pet. App. 1-3).

The state trial court held a pretrial evidentiary hearing on the motion to suppress. At the conclusion of that hearing, the state court trial judge denied the motion, finding that Tukes freely and voluntarily consented to the search. (Pet. App. 4-5).

After a trial, Tukes was convicted on all four charges. The issue regarding the validity of the search was one of three issues raised in the appeal of the conviction to the Third District Court of Appeal. *Tukes v. Dugger,* 911 F.2d 508 (11th Cir. 1990). (Pet. App. 19, 22) The Third District Court of Appeal affirmed the convictions without opinion. *Tukes v. State,* 507 So.2d 1110 (Fla. 3d DCA 1987).

Tukes then filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court, Southern District of Florida. That petition asserted three issues, including the claim that his consent to the search of his home was coerced and involuntary and that the fruits of that search should be suppressed. (Pet. App. 19-20, 22 at n. 3).

The United States Magistrate issued a Report which recommended that the petition be denied. (Pet. App. 6). As to the issue regarding the voluntariness of consent to the search of the residence, the Report concluded that this was

a Fourth Amendment claim which was fully and fairly litigated in the state courts and was precluded from federal habeas corpus review, pursuant to *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). (Pet. App. 13). On June 8, 1988, the United States District Judge issued a final judgment denying the petition for writ of habeas corpus, "[f]or the reasons stated in the report of the United States Magistrate, and upon independent review of the file...." (Pet. App. 18).

On appeal to the Eleventh Circuit Court of Appeals, Tukes presented several issues, including the claim that the consent to search of the residence was coerced and involuntary. *Tukes v. Dugger,* 911 F.2d 508 (11th Cir. 1990). (Pet. App. 19-20). The Eleventh Circuit Court of Appeals' decision included the following summary of the evidence presented at the state court suppression hearing:

> While investigating a double homicide, police were told that Tukes had been seen recently at the scene of the shooting. When Detectives Venturi, Remy, and Baraga went to Tukes' house, a woman answered the door and, in response to questioning, said that Tukes was at home. Tukes came to the door and agreed to talk to the police, but said he wanted to straighten out some matters first. The police asked if Tukes had a gun, and when he admitted that he did, the police asked Tukes if he would turn it over to them. He agreed. The firearm was not the murder weapon.
>
> The police waited inside the house while Tukes went into his bedroom and sorted through his papers. There were three women present, and Tukes gave some documents, apparently deeds or titles, to one of the women, instructing her to sell the property and saying, "I am going to have to get

lawyers." Detective Venturi asked Tukes why he wanted a lawyer, and informed him that he was not under arrest, that the police would like him "to voluntarily come [sic] downtown." Tukes acquiesced, but before he left, he consented to a search of his garage and car. He was driven in a police car to the police station where Detective Parmenter proceeded to interview him in an interrogation room measuring six by eight feet. Parmenter testified that the other investigators did not inform him of Tukes' statement at his home that he was "going to have to get lawyers."

Parmenter read Tukes the standard police department *Miranda* form because Tukes told the detective that he could not read or write. Although Tukes stated that he understood his rights, he refused to sign the waiver of right form. This exchange was not tape recorded. Tukes then provided an exculpatory statement from which he did not deviate despite the detective's continued interrogation for one and a half to two hours. At the end of that session, Tukes agreed to initial a consent form permitting the police to search his house for evidence of the crime.

Although Parmenter testified that Tukes was free to go at any time, Tukes was not told he was free to go, nor was he free to wander around the police station at pleasure. At deposition, Parmenter testified that after Tukes gave the consent he said he wanted to leave the police station. Parmenter, rather than permitting Tukes to go, asked him if he had left anything out of his statement, and then proceeded to reinterrogate Tukes. At the suppression hearing, however, Parmenter denied so testi-

> fying at deposition, and denied the substance of his prior sworn testimony.
>
> Tukes remained at the police station and was moved to another interrogation room where he was left alone for an hour and a half. Meanwhile, police searched Tukes' house and discovered ammunition and a pistol, wrapped in a towel splattered with what appeared to be blood. While forensic technicians examined the gun and towel, Tukes remained at the police station. When he said he was hungry, police officers brought food into the station for Tukes. Finally, in the late afternoon, having been at the police station all day, Tukes was formally placed under arrest and told he was being charged with murder. He invoked his right to counsel.

(Pet. App. 20-22) (footnotes omitted).

The Eleventh Circuit Court of Appeals initially held that the claim regarding the consent to search was a Fourth Amendment claim:

> ...Although in this case the fourth amendment concern is raised by way of an objection to the manner in which the police obtained the consent, nevertheless the objection remains one premised on the fourth amendment, i.e., that the search was unreasonable because it was based on consent that was not knowingly and voluntarily granted.

(Pet. App. 23-24). The Court observed that Tukes was seeking the suppression of the fruits of the search. *Id.* The Court further noted that Tukes was also claiming that the consent to search "was invalid because it was obtained after the police should have ceased questioning him because he had invoked his right to counsel." (Pet. App. 25). Nevertheless,

the Court still concluded that this was a Fourth Amendment claim pertaining to the validity of the search of the residence, which claim only involved consent to search. (Pet. App. 25-26).

Based on the conclusion that the claim was a Fourth Amendment claim, the Court acknowledged that "[f]ederal habeas corpus review of this claim is also governed by *Stone v. Powell.*" (Pet. App. 25). The Court had previously noted that:

> In this case, where the complaint of coercion goes to the consent under which a search was made by police, we conclude that the doctrine of *Stone v. Powell* applies to bar consideration of the claim in federal habeas if the issue has been fully and fairly litigated in the state courts.

(Pet. App. 24-25).

The Court then proceeded to conclude that the Fourth Amendment claim did not receive full and fair consideration in the state courts and that the *Stone v. Powell* bar to consideration of the claim in federal habeas corpus proceedings was inapplicable:

> The state trial court gave Tukes a full and fair evidentiary hearing relating both to his coerced consent and invocation of counsel claims. The trial court, however, while finding that his consent was given freely and voluntarily, made no explicit findings as to whether Tukes was in custody at the time he gave his consent, nor did the court provide a finding on whether Tukes had made a request for counsel that should have been honored by the interrogating officer. The state trial court also failed to make a factual finding as to whether

Parmenter's deposition or trial testimony should be believed.

The trial court's failure to make explicit findings on matters essential to the fourth amendment issue, combined with the fact that the state appellate court issued only a summary affirmance, precludes a conclusion in this case that the state provided the meaningful appellate review necessary to erect a *Stone v. Powell* bar to our review of the claim....

...*A fortiori,* where the trial court's findings which are essential to the disposition of the fourth amendment claim are unclear and the state appellate court writes no opinion, we deem the petitioner's fourth amendment claim not to have been fully considered within the meaning of *Stone v. Powell.* Accordingly, we turn to the merits of Tukes' claim that the evidence seized by the police was obtained in violation of his constitutional rights.

We emphasize that state courts are not required to issue lengthy opinions discoursing on the application of federal constitutional law, nor are they required to pen full opinions in place of summary dispositions. Further, we presume that the issues raised by Tukes in fact were given the careful, judicious, and studied attention of the Florida State Court of Appeal. Nevertheless, for purposes of the *Stone v. Powell* bar, where the trial court failed to make clear findings on essential issues, such a summary affirmance is insufficient to deny the petitioner consideration of the merits of his constitutional claim on federal habeas corpus review.

(Pet. App. 28-30) (footnotes omitted). In a footnote, the Court further observed, that "[h]ad the trial court's findings been clear in this case, then a summary affirmance might have constituted 'meaningful appellate review' as required by *O'Berry [v. Wainwright,* 546 F.2d 1204 (5th Cir.), *cert. denied,* 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977)] and *Stone.*" (Pet. App. 29 at n. 6).

The Court then proceeded to address the merits of the claim and concluded, after reviewing the evidence from the state court proceeding, based on the totality of the circumstances, that Tukes' consent to search was voluntary and knowing. (Pet. App. 33-37). The decision of the district court, denying relief, was affirmed. (Pet. App. 38). The State filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on December 6, 1990. (Pet. App. 41-42).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE LOWER COURT ENUNCIATED NEW STANDARDS FOR APPLYING *STONE V. POWELL,* WHICH STANDARDS CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS, AND WHICH STANDARDS IMPOSE BURDENS ON STATE COURTS WHICH ARE INCONSISTENT WITH RECOGNIZED PRINCIPLES OF COMITY AND FEDERALISM.

The decision of the Eleventh Circuit Court of Appeals sets forth new standards for determining whether a Fourth Amendment claim was fully and fairly litigated in state courts for purposes of *Stone v. Powell.* The lower court's decision enunciates the requirements that the state trial court must explicitly set forth findings beyond the conclusion that consent to search was voluntary and knowing, and that in the absence of such explicit findings, the state appellate court must do more than issue an opinion summarily affirming the state trial court. Those requirements are in conflict with this Court's decisions in *Stone v. Powell* and *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Those requirements are in conflict with decisions from other Circuit Courts of Appeals. Furthermore, the decision has serious implications for the doctrines of comity and federalism.

Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), held "that for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence in an unconstitutional seizure was introduced at his trial." The decision also speaks in terms of "full and fair consideration." 428 U.S. at 486, 489. As to the requirements

of "an opportunity for full and fair litigation," this Court referred to its prior decision in *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). 428 U.S. at 494, n. 36. *Townsend* clearly dispels the notion set forth by the Eleventh Circuit below, that any explicit or express findings from the state trial court are required in order to satisfy the requisite "opportunity for full and fair litigation." Initially, *Townsend* notes that "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." *Id.* at 313-14. The Court then proceeded to address the question of evaluating state court proceedings in which there are no express findings:

> ...Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits.... If the prior state hearing occurred in the course of the original trial — for example, on a motion to suppress allegedly unlawful evidence, as in the instant case — it will usually be proper to assume that the claim was rejected on the merits.
>
> If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

Id. at 314. In determining whether such a reconstruction is possible, the Court noted that:

> ...the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we may think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence...that there is reason to suspect that an incorrect standard was in fact applied.

Id. at 314-15. By way of example, the Court noted that in face of allegations of third degree methods of obtaining a confession, the refusal of a state court to suppress would create the assumption that the state court found the facts against the defendant. *Id.*

It is clear from the foregoing discussion that the lower court's emphasis on the need for explicit findings on a variety of subissues is in conflict with this Court's pronouncements in *Stone v. Powell* and *Townsend.*

The lower court's decision further conflicts with many decisions from other Circuit Courts of Appeals. For example, in *Caldwell v. Cupp,* 781 F.2d 714 (9th Cir. 1986), the habeas corpus petitioner, when presenting a Fourth Amendment claim, argued that the state trial court's findings were inadequate to support its legal conclusions, thereby denying him a full and fair hearing on that claim. The state appellate court, as in the instant case, had affirmed the conviction without opinion. *Id.* at 715. The Ninth Circuit Court of Appeals rejected the petitioner's argument and applied the *Stone v. Powell* bar precluding federal habeas review:

> Caldwell argues too much. All *Stone v. Powell* requires is the initial opportunity for a fair

> hearing. *Id.* at 494, 96 S.Ct. at 3052. *Such an opportunity for a fair hearing forecloses this court's inquiry, upon habeas corpus petition, into the trial court's subsequent course of action,* [citations omitted], *including whether or not the trial court has made express findings of fact.*
>
> (emphasis added).

Thus, both *Caldwell* and the instant case involve a state trial court ruling on the merits of the Fourth Amendment issue, an absence of explicit factual findings in support of that ruling, and an appellate court affirmance without opinion.

The Fifth Circuit, in *Tackno v. Blackburn,* 571 F.2d 1383 (5th Cir. 1978), has similarly held that a state appellate court's summary disposition of an appeal did not result in a denial of full and fair consideration of a search and seizure issue by the state courts. The Eighth Circuit has adopted a similar approach. In *Rigsbee v. Parkinson,* 545 F.2d 56 (8th Cir. 1976), the state circuit court denied a suppression motion. On appeal, the state Supreme Court found that there was probable cause to conduct a search of the car which had been stopped. The petitioner contended in federal court that he was denied an opportunity to fully and fairly litigate his Fourth Amendment claims because neither state court addressed the issue of consent. The Eighth Circuit rejected that claim and barred federal habeas review, based on *Stone v. Powell,* because the petitioner "was given an opportunity to fully and fairly litigate this claim in state court." 545 F.2d at 57, n. 3.

In *Moore v. Cowan,* 560 F.2d 1298 (6th Cir. 1977), after a state trial court denied a motion to suppress, the state appellate court's decision bypassed the merits of the issue, merely referring to the existence of overwhelming evidence and the conclusion that any other errors were harmless. *Id.*

at 1301-1302. The federal courts refused to reach the Fourth Amendment issue in habeas corpus proceedings:

> We do not read *Stone v. Powell* as requiring the reviewing court to do more than take cognizance of the constitutional claim and render a decision in light thereof. There is no mandate that in announcing a decision such court fully should expound upon such alleged error.

Id. at 1302.

Several prior decisions of the Fifth Circuit also lead to the inevitable conclusion that explicit findings are not required of the state courts. *Caver v. Alabama,* 577 F.2d 1188 (5th Cir. 1978), emphasized that the salient factor was the "opportunity" to litigate. Thus, the Court held that the *Stone v. Powell* bar would apply, whether or not the defendant availed himself of the opportunity to litigate in state court, "if the state procedures afford the defendant in a criminal case the opportunity to litigate whether evidence obtained in violation of the fourth amendment should be excluded...." *Id.* at 1193.

In *Swicegood v. Alabama,* 577 F.2d 1322, 1324 (5th Cir. 1978), the defendant argued that he did not receive *full* consideration of his fourth amendment claim by the state courts because the state courts "dealt with the illegal arrest question only 'in passing' and without any reasoned consideration and that he was denied *fair* consideration because the state courts misapplied settled principles of constitutional law." The Court rejected both of those claims, stating that if they were accepted, *Stone* would be rendered meaningless. *Id.* Thus, even a belief by the federal court that the state courts decided the issue incorrectly cannot result in the denial of an opportunity for full and fair consideration. Id. at 1324-25. If a federal court's belief as to the erroneous decision of a state court cannot result in the denial of an

opportunity for full and fair consideration, it seems utterly absurd to conclude that a lack of explicit findings, without any belief that the state's decision is erroneous, can result in a denial of an opportunity for full and fair consideration.

These principles were carried even further in *Williams v. Brown,* 609 F.2d 216 (5th Cir. 1980). There, a state court mistake occurred in a ruling on whether the defendant's fourth amendment claim had already been presented in state court, thus resulting in an error which prevented the state court from considering the merits of the claim. The Court, upon federal habeas appellate review, held:

> ...Nevertheless, in the absence of allegations that the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits, the rationale of Caver dictates that *Swicegood's* application of *Stone* despite a mistake in adjudicating the merits must apply with equal force to procedural mistakes that thwart the presentation of fourth amendment claims. Accordingly, we find that the district court correctly dismissed petitioner's fourth amendment claims as being barred by *Stone v. Powell.*

609 F.2d at 220. Thus, the *Stone v. Powell* bar applied even where the state court erroneously refused to reach the merits of the fourth amendment claim. Not only did the state court not have the obligation of providing explicit findings as to the merits of the claim in order to satisfy *Stone v. Powell,* but a hearing on the merits did not even have to be conducted. It is a mighty long step from *Williams* to the instant case where the *Stone v. Powell* bar is not applied, even though a lengthy hearing on the merits was conducted in state court, coupled with lengthy legal arguments,

coupled with an explicit ruling on the merits, denying suppression on the grounds that the consent was voluntarily and intelligently given, coupled with a review of the merits of that decision in a state appeal.

In *Smith v. Wainwright,* 581 F.2d 1149 (5th Cir. 1978), the state trial court denied the defendant's motion to suppress consent to search. The Court's decision, on federal habeas review, makes no reference to any explicit findings by the state trial court, other than a finding that the consent was voluntary. Furthermore, it is noted that the state appellate court affirmed without opinion. *See, Smith v. State,* 344 So.2d 867 (Fla. 4th DCA 1977). Nevertheless, notwithstanding the apparent absence of explicit findings by the trial court, and notwithstanding the appellate court's per curiam affirmance, the Court applied the bar of *Stone v. Powell,* since the claim had been pursued in both the state trial and appellate courts. 581 F.2d at 1151.

Not only is the lower court's decision in conflict with a wide array of decisions from this Court and other Circuit Courts of Appeals, but the implications of the majority decision are enormous, as the decision effectively renders *Stone v. Powell* meaningless. The lower court's decision is an open door for federal courts to review virtually any Fourth Amendment issue in federal habeas corpus proceedings. Any time a state trial court fails to explicitly specify which of several contradictory witnesses are believed, the lower court's decision would circumvent the bar of *Stone v. Powell.* Must the state court spell out, witness by witness, who is believed and who is not? It would be a rare case, indeed, where a federal court so desiring, could not find some subissue on which there is no explicit finding by the state courts. In an overburdened judicial system, the imposition of a requirement that the state courts make such explicit findings of fact creates an unjustified and unwarranted burden on the system.

Reverting back to *Townsend,* it can further be seen that even in the absence of explicit rulings as to certain factual matters, the state trial court's rulings can easily be reconstructed implicitly. The majority decision below was concerned firstly with the absence of an explicit finding as to whether Tukes was in custody at the time he gave consent to the search. Had the judge found that Tukes was in custody when he requested counsel, it is virtually inconceivable that he could have found that the subsequent questioning to obtain consent to search was proper. As suppression would almost certainly have resulted from a finding of custody, the only reasonable inference is that the trial judge rejected defense counsel's arguments that Tukes was in custody while being questioned at his residence. The state trial court's rejection of the claim that Tukes was in custody is further inherent from that court's rejection of Tukes' second claim, that statements that he made, both at home and at the police station, should be suppressed under *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1978), since the statements followed a request for counsel. From the lower court's discussion of this issue (Pet. App. 30-34), it can readily be seen that the only plausible basis for rejecting it is a conclusion that Tukes was not in custody. Thus, just as such a conclusion was the necessary basis for rejecting the *Edwards* claim regarding Tukes' statements, it further follows that since the judge had to find an absence of custody on that issue, an absence of custody was likewise found on the consensual search issue.[1] The assumption of a lack of custody follows every bit as much as the example in *Townsend,* in which it could be presumed from the refusal to suppress that a state court found the facts against the

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1 Alternatively, if suppression of items found in the search could be denied regardless of whether custody existed, the existence, or lack, of custody, would hardly be a material fact requiring any decision from the trial court.

petitioner, regarding alleged coercive methods to obtain a confession. 372 U.S. at 315.

The majority decision further asserts that there were no explicit findings as to whether Tukes made a request for counsel that should have been honored by the interrogating officer. Here, too, the only legitimate inference from the state court's ruling is that the request for counsel did not have to be honored. Any contrary conclusion would have resulted in suppression, at least of the statements referred to in the *Edwards* claim, if not to the seized items from the search, as well. Alternatively, if the request for counsel would not necessitate suppression of the items seized in the search, it would hardly be a material fact requiring any finding, let alone an explicit one, as to that issue.

The majority decision lastly refers to the lack of an explicit factual finding as to whether Parmenter's deposition or trial testimony should be believed, regarding whether Parmenter reinterrogated Tukes when Tukes requested to leave. The majority decision ignores cardinal tenets of Florida appellate procedure. In Florida, when an issue is presented on appeal, the evidence, together with all reasonable inferences therefrom, is viewed in the light most favorable to the prevailing party. *See, e.g., E.Y. v. State,* 390 So.2d 776 (Fla. 3d DCA 1976); *Dawson v. State,* 338 So.2d 242 (Fla. 3d DCA 1976); *State v. Rizo,* 463 So.2d 1165 (Fla. 3d DCA 1984). Indeed, in Florida, an appellate court "must assume that the trier of fact 'believed that credible testimony most damaging to the defendant and draw from the facts established those reasonable conclusions most unfavorable to the defendant.'" *E.Y., supra,* at 778, quoting *Parrish v. State,* 97 So.2d 356, 358 (Fla. 1st DCA 1957), *cert. denied,* 101 So.2d 817 (Fla. 1958). Thus, the only legitimate conclusion is that the Florida appellate court treated the evidence in the light most favorable to the State, and in the most damaging way to the defendant, which necessarily implies that the Florida courts

viewed Parmenter's suppression hearing testimony controlling over his deposition testimony. Accordingly, all of the issues referred to by the majority decision herein can easily be seen to resolve implicitly in manners that are clear and consistent with the trial court's resolution of the merits of the issue. Nothing more is required of state court proceedings than that.

The fundamental question raised by the lower court's opinion is: what benefit is derived from requiring explicit state court findings regarding a multitude of subissues? There is no basis for believing that such a requirement will enhance the likelihood that state courts will reach better conclusions on Fourth Amendment issues. Nor is there any basis for believing that a requirement of such explicitness will ensure that greater consideration is given by the state courts to those issues. Indeed, the lower court acknowledges this by providing that "we presume that the issues raised by Tukes in fact were given the careful, judicious, and studied attention of the Florida State Court of Appeal." (Pet. App. 30). If that is so, why are the state court rulings being treated with a condescension on the part of the federal judiciary that deems them inherently suspect, notwithstanding the professed faith in the state court's consideration of the issues? Similarly, the lower court noted that "[t]he state trial court gave Tukes a full and fair evidentiary hearing....⊇ (Pet. App. 28). The lower court apparently wishes to engage in the self-contradictory notion that the state courts did not give the issues full and fair consideration even though they did give the issues full and fair consideration.

If the lower court's concern is with the correctness of the state court's rulings, such concern runs contrary to *Stone v. Powell*. Regardless of the correctness of the ruling, the physical evidence is still reliable evidence, and *Stone's*

concerns go only to the full and fair opportunity to be heard and the full and fair consideration of the issues.

When Fourth Amendment issues are decided in federal district courts, in federal criminal cases, without explicit findings, there is no extant body of case law creating a similar presumption that the district court hearing was anything less than full and fair, and such decisions by the district court are routinely affirmed without remanding for a further "full and fair" hearing. Indeed, such district court decisions still receive a high level of deference in the form of presumptions that require the evidence to be viewed in the light most favorable to the government. *See, e.g., United States v. Sarda-Villa,* 760 F.2d 1232 (11th Cir. 1985) (on appeal, evidence at suppression hearing viewed in light most favorable to government); *United States v. Eagle,* 849 F.2d 924 (5th Cir. 1988) (on appeal, district court's factual findings must be accepted unless clearly erroneous). The Petitioner is unaware of any decisions which alter the foregoing presumptions when federal district court findings are less than fully explicit.

In view of the foregoing, the importance of this issue can easily be seen. Not only has the lower court rendered *Stone v. Powell* meaningless, but that Court has imposed a great burden on the state courts. The decision of the lower court also adds to the burden of federal courts, by requiring them to reach the merits of Fourth Amendment claims in large numbers of federal habeas corpus proceedings. Such burdens are unwarranted where a defendant had a full and fair evidentiary hearing in state court, with the opportunity to present any evidence and legal arguments desired; where the merits of the claim were expressly rejected by the trial court; where the claim was presented to and considered by the state appellate court, and where the denial of suppression was affirmed by the appellate court. In view of both the importance and vast application of this issue, as well as the

conflicts with decisions of this Court and other Circuit Courts of Appeals, it is submitted that certiorari review is warranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

No. ____

IN THE

Supreme Court of the United States

October Term, 1990

RICHARD L. DUGGER, Secretary
Florida Department of Corrections,

Petitioner,

vs.

JOHN T. TUKES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

APPENDIX

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 85-6131

JUDGE: SALMON

THE STATE OF FLORIDA,

Plaintiff,

vs.

JOHN TUKES,

Defendant.

MOTION TO SUPPRESS EVIDENCE

The Defendant, JOHN TUKES, by and through his undersigned attorney, pursuant to Florida R Crp 3.190 (h), moves this Honorable Court to suppress as evidence in the trial of the above styled cause a standard fingerprint card, a white towel, a box of ammunition and its contents, and the results of all laboratory testing performed upon said evidence, on the grounds that they were illegally seized.

FACTS

1. John Tukes was contacted by the police at his home and taken to the police station.

2. John Tukes was questioned without counsel being present.

3. John Tukes indicated that he could not read or write.

4. While he was in police custody and before there was probable cause for his arrest, the police searched Mr. Tukes' home without a search warrant.

5. A white towel and a box of ammunition were found in Tukes' home.

6. Various forensic tests were later conducted upon said evidence.

7. Before there was probable cause for his arrest, fingerprint standards were taken from Mr. Tukes.

GROUNDS

1. The aforementioned evidence was obtained pursuant to an unreasonable search and seizure in violation of the defendant's rights guaranteed by the Search and Seizure Clause of the Fourth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

2. The evidence was seized as a result of a search without a valid search warrant and without complying with any of the narrow exceptions to the search warrant requirements of the United States and Florida Constitution.

3. The evidence was obtained by virtue of an illegal detention and interrogation of the Defendant in violation of his right to counsel and privilege against self-incrimination as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and are therefore "fruits of the poisonous tree."

WHEREFORE, the Defendant, JOHN TUKES, requests this Honorable Court to grant this motion and suppress as evidence in trial the white towel, the box of ammunition and

its contents, the standard fingerprints taken from the Defendant, and all results obtained from the laboratory testing of said evidence.

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to the Office of the Assistant State Attorney, Michael Band, Esquire, Judge Salmon's Division, 1351 N.W. 12th Street, Miami, Florida 33125 this 12 day of August, 1985.

BY_____

JOEL DEFABIO, ESQUIRE
1320 South Dixie Highway
Suite 280
Coral Gables, Florida 33146
(305) 667-3888

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 85-6131

THE STATE OF FLORIDA,

Plaintiff,:

vs.

JOHN TUKES,

Defendant.

---

[189] Transcript of proceedings had before the Honorable MICHAEL H. SALMON, Circuit Court Judge, in the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on Thursday, November 22, 1985, commencing at or about 8:00 a.m.

. . .

[230] THE COURT: Based on the evidence I heard, all the argument that was made which I appreciate, I am going to make a finding that the statements were freely and voluntarily given, freely and voluntarily went to the station, that the waiver to search form

[231]

was signed freely and voluntarily.

MR. DEFABIO [defense counsel]:
There was no formal signing?

THE COURT: I am sorry. He did not— the search form was read to him that he refused to sign but it was read to him and that he understood it and that he freely and voluntarily and intelligently and I will deny the motion.

. . .

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0255-Civ-SPELLMAN
MAGISTRATE SORRENTINO

JOHN T. TUKES,:

Petitioner,

vs.

RICHARD L. DUGGER,

Respondent.

REPORT OF UNITED STATES MAGISTRATE

John Tukes, a state prisoner currently confined at the Union Correctional Institution, has filed a *pro se* habeas corpus petition pursuant to 28 U.S.C. § 2254, attacking his convictions for two counts of first degree murder, one count of armed burglary and one count of possession of a firearm during the commission of a felony, entered on January 14, 1986, upon a jury verdict in Case No. 85-6131, in the Circuit Court of the Eleventh Judicial Circuit of Florida, at Dade County.

This cause has been referred to the undersigned for preliminary consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

For its consideration of this petition, the Court has the respondent's Response to an order to show cause, which was filed together with multiple documentary exhibits. The petitioner has filed a traverse.

This petition raises three issues, essentially as follow:

1. Whether Tukes' written consent to search his home was obtained in violation of his right to have all questioning cease once right to an attorney was allegedly invoked, rendering the evidence seized the fruit of the poisonous tree. Edwards v. Arizona, 451 U.S. 477 (1980).

2. Whether Tukes' written consent to search his home was coerced and involuntary in that Tukes did not understand his true position as the sole suspect in the case when he signed the consent form.

3. Whether the jury which convicted Tukes was selected in an intentionally racially discriminatory manner.

On March 9, 1985, at approximately 4:30 A.M., Olive Jean Brown, a former girlfriend of Tukes, and her son, Carl Brown, were murdered. (R/135,167). Tukes, a 58 year old black man with an I.Q. in the borderline or mildly retarded range, (TR/177-78), was visited by police officers at his home and agreed to answer questions at the police station. Upon arrival at the police station, he orally waived his Miranda Rights and gave both oral and written consent to a search of his home. Tukes remained at the police station until after the evidence seized was analyzed, at which point he was arrested. On March 26, 1985, Tukes was indicted for two counts of first degree murder and one count each of armed burglary and possession of a firearm during the commission of a felony.

On August 12, 1985, motions to suppress certain oral statements and the physical evidence seized were filed. Prior to trial, a lengthy competency hearing and evidentiary hearing on the motions to suppress was held. The trial judge found Tukes competent to stand trial and denied the motions to suppress.

On January 14, 1986, Tukes was convicted by a jury on all counts, and sentenced to two consecutive life terms on the murder charges and two concurrent terms of twenty-five years and fifteen years each on the two other charges.

A direct appeal was filed, raising the exact issues raised in this federal petition, and the convictions were affirmed, *per curiam,* without opinion or citations. *Tukes v. State,* 507 So.2d 1110 (Fla. 3d Dist. 1987). Tukes has exhausted his state remedies as to all of the claims of this petition.

Tukes first contends that he asserted his Constitutionally protected right to counsel while at home, but the police impermissibly questioned him at the police station by obtaining an oral waiver of his rights and oral and written consent to search his home. This search led to the seizure of physical evidence, consisting of a blood stained towel and an ammunition box, used by the prosecution at trial.

The fruit of the poisonous tree doctrine is applicable to certain Fifth Amendment violations as well as to Fourth Amendment violations. *See: Michigan v. Tucker,* 417 U.S. 433 (1973). Although the fruit of the poisonous tree doctrine is not available for violations of prophylactic procedural rules such as the *Miranda* warnings, devised to safeguard the rights accorded by the Fifth Amendment, it remains available to violations of the Fifth Amendment itself. *Oregon v. Elstad,* 470 U.S. 298, 305-308 (1984). Since the primary claim questions whether the police disregarded Tukes' attempt to exercise his Fifth and Sixth Amendment right to remain silent until he conferred with counsel, the claim is not barred from federal habeas corpus review by the doctrine of *Stone v. Powell,* 428 U.S.C. 465 (1975), which precludes federal review of Fourth Amendment claims litigated in state courts. *See: Oregon v. Elstad, supra.; Cardwell v. Taylor,* 461 U.S. 571 (1983) (per curiam).

The sequence of police activity after the murders was as follows: Officers Venturi, Remy, and Barraga obtained information from witnesses and from family members that Tukes was seen in the area of the victim's home. Tukes was the only suspect when the officers went to his home to question him. (TR/139). Tukes let the officers into his home and agreed to talk with them when he finished attending to some affairs. (TR/135). He admitted having a firearm, (not the murder weapon) and gave the officers permission to impound it. (TR/136).

While the officers waited for Tukes to finish, they observed him go to another room and give three women who were present some papers, one of which resembled a deed. As Tukes did this, he told the women to sell properties because he would need to get lawyers. Officer Venturi testified that in response to those comments he explained to Tukes that he was only being asked to go in for questioning. One of the women asked the Officer if Tukes had to go with the police and was told no, that he had agreed to go. One of the women said that Tukes wanted to sell something in order to obtain a bond. (TR/136-42).

Tukes completed his arrangements in about fifteen minutes and was driven to the police station, after making a statement to the effect that he was going to get lawyers. (TR/142). Prior to leaving Tukes was asked for and gave consent to have the police at some time conduct a search of his garage and car. (R/137).

At approximately 10:30 a.m., Tukes was taken for questioning to a six by eight foot interview room with a desk and two chairs. (TR/153). Tukes was not handcuffed. (TR/156). Detective Parmenter told Tukes that he believed that Tukes had some knowledge of the murders, but did not tell him that he was a suspect. (TR/156).

Detective Parmenter read Tukes the standard *Miranda* rights form, and went over each right after ascertaining that Tukes had only a fourth grade education and could neither read nor write. (TR/145). Detective Parmenter asked Tukes if he would talk without an attorney present, and Tukes replied that he would, but that he would not sign anything. (TR/145).

Detective Parmenter then asked Tukes to give an account of his previous evening. Tukes said that he went to the house of Olive Brown, his ex-girlfriend, around 8 or 9:00 p.m., for the purpose of getting back together with her. Tukes said that while there, he and Ms. Brown discussed the building of a new addition to her house. He then went to Eddie's Bar, met a girl there, and drove home about 2:00 a.m. (TR/146-47).

Detective Parmenter went over Tukes' story with him several times over a period of about 1 1/2 to 2 hours, (TR/147), during which time Tukes may have expressed a desire to go home, to which the Detective responded by asking if Tukes was sure he hadn't left anything out, and Tukes rambled over the same story again. (TR/162). Tukes was asked permission to search his home, and agreed, saying that he had nothing to hide. (TR/147-48). At approximately 2:00 p.m., Tukes agreed to supply fingerprints and photographs. (TR/150, 163).

At approximately 3:30 or 4:00 p.m., Tukes was taken to an eight by ten foot homicide interview room, where he was questioned by Detective Saladregus, the lead detective in the case, who reviewed the *Miranda* warning with him. Tukes indicated that he was hungry, and food was brought to him. (TR/165,168). The search of Tukes' residence was effected at 5:15 p.m., while Tukes remained in the interview room, and a towel with blood stains and an ammunition box were seized. (TR/151-52). Detective Saladregus testified

that Tukes was free to go until this evidence was analyzed at the crime laboratory and reviewed with an Assistant State Attorney for probable cause. (TR/171-72).

Tukes was then arrested for two counts of first degree murder. He was asked if he wanted to review his prior statements or make a formal statement, but replied:

> No. If you're going to arrest me I want to go ahead and get an attorney and I want to know how much my bond is. (TR/172).

Tukes claims that he invoked his right to counsel at home when he commented within the hearing of the officers that he wanted to sell property to obtain a lawyer. He challenges all further interrogation and waivers as in violation of *Edwards v. Arizona,* 451 U.S. 477 (1980).

Edwards requires that once a defendant has made a clear and unambiguous request to have an attorney present, all questioning must cease, unless the defendant initiates a valid waiver or until counsel is present.

However, the Fifth Amendment standards and the similar Sixth Amendment standard enunciated in *Brewer v. Williams,* 430 U.S. 387 (1977), apply to police conduct only after a defendant is in custody, or after the adversarial process has begun, respectively.

A state court's findings of fact are presumed correct in a federal habeas corpus proceeding if they are fairly supported in the record and if the other circumstances enumerated in 2254(d) are inapplicable. *Miller v. Fenton,* 474 U.S. 104 (1985); *Fike v. James,* ___ F.2d ___ (11 Cir. No. 86-7896, Dec. 15, 1987).

The state trial judge, after a hearing comprising some 100 pages of transcript, made specific findings of fact and conclusions of law. (TR/229-30). The essential rulings are as follow:

1. Tukes freely and voluntarily went to the police station.

2. Tukes' statements were freely and voluntarily made.

3. Tukes freely and voluntarily agreed to the search of his house, although he declined to sign the written consent. The consent form was read to him, he understood it, and freely, voluntarily, and intelligently consented to the search.

Although the trial court's findings of fact are presumed correct in the absence of one of the exceptions specified at 28 U.S.C. § 2254(d), this Court must independently apply the applicable principles of Constitutional law. *Cape v. Francis,* 741 F.2d 1287 (11 Cir. 1984); *Paxton v. Jarvis,* 735 F.2d 1306 (11 Cir. 1984).

The findings and conclusions of the trial court involve mixed questions of fact and law.

An independent review of the record indicates that the trial court correctly applied the applicable Constitutional principles to the facts of this case. Tukes was not in custody at the time he was questioned by the police at the police station. Tukes did not testify at the suppression hearing. It is uncontested that he was not pressured into going to the police station or in talking to the police. He agreed to answer questions at home when he had friends present, and he was otherwise cooperative with the police, allowing them to impound a firearm and to search his car and garage. The police allowed him as much time as he wanted to arrange

his affairs. Officer Venturi emphasized to Tukes that he was not under arrest and also explained to Tukes' friend that Tukes did not have to go if he did not want to. Despite the facts that Tukes' intelligence was low and that he was driven rather than having gone by himself to the police station, the trial judge was correct in his finding that Tukes went to the station voluntarily. At the station, the police did not consider that they had probable cause to arrest Tukes and deemed him not to be in custody when they obtained his statements and the consent to search his home. The adversarial process had not begun.

The second issue of this petition is whether Tukes voluntarily gave his consent to search his home. Since Tukes was not in custody at the time he gave the consent this claim is governed wholly by Fourth Amendment standards. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

Fourth Amendment claims which have been fully and fairly litigated in the state courts are precluded from federal habeas corpus review. *Stone v. Powell,* 428 U.S. 465 (1976).

Tukes' final claim that the prosecutor exercised his challenges in a discriminatory manner so as to remove all black venireman from Tukes' jury, is facially insufficient.

The respondents contend that the claim is also barred from federal habeas corpus review under the doctrine of *Wainwright v. Sykes,* 433 U.S. 72 (1977), because Tukes failed to make a contemporaneous objection as required by Florida law for a similar claim under the Florida Constitution. *See: State v. Neil,* 457 So.2d 481, 486 (1984).

However, this court need not decide whether defense counsel's precatory statements made after the peremptory strike of one of the black venireman comported with Florida procedural requirements, because the record reveals that the claim is frivolous.

Purposeful discrimination by the state in the selection of a jury violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky,* ____ U.S. ____, 106 S.Ct. 1712 (1986); *Swain v. Alabama,* 380 U.S. 202 (1965). In order to make a prima facie showing, however, a defendant must initially establish on the record that he is a member of a cognizable racial group and that the prosecution intentionally used its peremptory challenges to exclude members of the defendant's racial group from his venire. An inference of this intent may be drawn from all relevant circumstances, including, but not limited to a pattern of strikes against black jurors in a defendant's particular venire, and the prosecutor's questions and statements during voir dire examination or in the exercise of his or her challenge.

Once the defendant has made a prima facie showing, the prosecution must advance a neutral explanation related to the particular case for his challenges. *Batson, supra.*

The *Batson* requirements are applicable retroactively to cases such as this, which had appeals pending at the time of the *Batson* decision. *Griffith v. Kentucky,* ___ U.S. ___, 107 S.Ct. 708 (1987).

A careful review of the record fails to reveal any circumstances which raise an inference of an intent to discriminate.

Tukes, a black man, was tried by a twelve person, all white jury. Out of a jury pool of sixty to seventy persons, only four or five were black. (R/574). Of these, only three came up for questioning as prospective jurors. (R/525). Two black men, Mr. Martin, and Mr. Butler, came up for questioning in the initial panel. They were both accepted by the state. (R/414-15). Mr. Butler told the Bailiff, and then stated in open court that he did not feel well, and was excused from further service for the weekend, while jury selection continued, but told to return the following Monday. (R/423-24).

During a resumption of challenges after an examination of additional prospective jurors, the prosecutor used one of his peremptory challenges to eliminate the first black juror, Mr. Martin. (R/525).

Thereafter, the following exchange took place: (R/527).

> MR. DEFABIO: Going back, I want the record reflect the State struck Mr. Martin. There are only two black males, or black people at all, as potential jurors, and Mr. Martin was struck by the State, leaving us with one black juror, which will be Mr. Butler, just so the record reflects that.
>
> THE COURT: All right. The panel has been tendered by the State.
>
> MR. DEFABIO: I don't know if it's still — I understood a while back Ms. Reno said that all her State Attorneys were instructed to give reasons whenever they strike black jurors.
>
> MR. BAND: There is no policy like that.
>
> MR. DEFABIO: Just asking. It was my impression there was. If there is not, it's not. It was in the paper once.
>
> I'm going to strike Mr. Howard.

Upon defense request a few days later, the trial court considered excusing the second black juror, Mr. Butler, because Mr. Butler had seen a physician and was still ill with an intestinal virus. (R/552). The prosecutor wanted to retain Mr. Butler because the venireman to be substituted, Mr. Eubanks, had expressed a desire not to serve on the jury. He asked that additional jurors be considered rather than Eubanks. (R/552-53).

Eubanks was ultimately excused for cause, after insisting that he would have difficulty in finding another person guilty of taking a life, because he had paid for the abortion of one of his children some years before. He asked to be excused. (R/553-60).

The prosecutor was apprehensive that the defense intended to raise the issue of whether the prosecution was effectively eliminating black jurors, so he suggested that when more prospective jurors were brought down from the pool, if any black members were included, they should be considered out of order and first, and that he would not use his remaining peremptory challenges to eliminate them. (R/561-62).

Defense counsel agreed, stating in part, that:

> We have been in a situation where all the black jurors were either excused for cause or stricken by the State. And, *through no fault of the State or the Court, that just is the situation.* (R/562); (Emphasis added).

After further discussion along the same lines, the Court stated:

> If there's - - we will seat them in the normal ordinary course, we will question them, but we will change the selection procedure. (R/563).

The prosecutor added;

> That is terrific. They will have no way of knowing when we go to sidebar to take the challenges the first juror we will discuss would be that black person. (R/563).

As it turned out, no blacks were present in the next group of prospective jurors. (R/573-74).

It is apparent that the prosecutor was responsible for the removal of only two of the three black venireman from the petit jury. One of these two veniremen was removed for good cause established on record. Further, defense counsel noted on the record that the elimination of all prospective black jurors was not the fault of the prosecution or the court. Most importantly, the prosecutor suggested a procedure specifically intended to help impanel a black juror.

Since no inference of intent to discriminate in the selection of the jurors in this case is raised by the existing record or otherwise, no *prima facie* showing of discrimination has been made.

No showing having been made that John Tukes is in custody in violation of the Constitution or laws of the United States, it is the recommendation of the Magistrate that this petition for writ of habeas corpus be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: May 20, 1988

UNITED STATES MAGISTRATE

cc: John T. Tukes
Richard L. Polin, Asst Atty General

United States District Court Southern District Of Florida

CASE NO. 88-0255-Civ-SPELLMAN
MAGISTRATE SORRENTINO

JOHN T. TUKES,

Petitioner,

vs.

FINAL JUDGMENT

RICHARD L. DUGGER,

Respondent.

For the reasons stated in the report of the United States Magistrate, and upon independent review of the file, it is

ORDERED AND ADJUDGED that this petition for writ of habeas corpus is denied.

DONE AND ORDERED at Miami, Florida this 29 day of June , 1988.

UNITED STATES DISTRICT JUDGE

cc: John T. Tukes

Richard L. Polin, Asst. Attorney General

United States Court of Appeals

ELEVENTH CIRCUIT
No. 88-5685

JOHN T. TUKES,

Petitioner-Appellant,

vs.

RICHARD L. DUGGER,
Secretary, Department of Corrections,

Defendant-Appellee.

[Sept. 7, 1990]

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH, Circuit Judge, RONEY*, Senior Circuit Judge, and ALDISERT**, Senior Circuit Judge.

John Tukes appeals the denial of the writ of habeas corpus by the district court, which adopted the report and recommendation of the magistrate. Arguing that the fruits of a search of his home should be suppressed, Tukes contends that his consent to the search was coerced and involuntary and obtained in violation of his right to have counsel present. He further argues that the jury that convicted him was selected by the prosecutor in an intentionally discriminatory

---

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge forthe Third Circuit, sitting by designation.

manner. We conclude, however, that Tukes's claims fail on the merits; therefore, we affirm the district court's denial of relief.

BACKGROUND

While investigating a double homicide, police were told that Tukes had been seen recently at the scene of the shooting. When Detectives Venturi, Remy, and Barraga[1] went to Tukes's house, a woman answered the door and, in response to questioning, said that Tukes was at home. Tukes came to the door and agreed to talk to the police, but said he wanted to straighten out some matters first. The police asked if Tukes had a gun, and when he admitted that he did, the police asked Tukes if he would turn it over to them. He agreed. The firearm was not the murder weapon.

The police waited inside the house while Tukes went into his bedroom and sorted through his papers. There were three women present, and Tukes gave some documents, apparently deeds or titles, to one of the women, instructing her to sell the property and saying, "I am going to have to get lawyers." Detective Venturi asked Tukes why he wanted a lawyer, and informed him that he was not under arrest, that the police would like him "to voluntarily come [sic] downtown." Tukes acquiesced, but before he left, he consented to a search of his garage and car. He was driven in a police car to the police station where Detective Parmenter proceeded to interview him in an interrogation room measuring six by eight feet. Parmenter testified that the other investigators did not inform him of Tukes's statement at his home that he was "going to have to get lawyers."

---

1 Officer Barraga's name is variously spelled throughout the pleadings and record of this case. We adopt the spelling used by the court reporter in the suppression hearing in state court.

Parmenter read Tukes the standard police department *Miranda* form because Tukes told the detective that he could not read or write. Although Tukes stated that he understood his rights, he refused to sign the waiver of rights form. This exchange was not tape recorded. Tukes then provided an exculpatory statement from which he did not deviate despite the detective's continued interrogation for one and a half to two hours. At the end of that session, Tukes agreed to initial a consent form permitting the police to search his house for evidence of the crime.[2]

Although Parmenter testified that Tukes was free to go at any time, Tukes was not told he was free to go, nor was he free to wander around the police station at pleasure. At deposition, Parmenter testified that after Tukes gave the consent he said he wanted to leave the police station. Parmenter, rather than permitting Tukes to go, asked him if he had left anything out of his statement, and then proceeded to reinterrogate Tukes. At the suppression hearing, however, Parmenter denied so testifying at deposition, and denied the substance of his prior sworn testimony.

Tukes remained at the police station and was moved to another interrogation room where he was left alone for an hour and a half. Meanwhile, police searched Tukes's house and discovered ammunition and a pistol, wrapped in a towel splattered with what appeared to be blood. While forensic technicians examined the gun and towel, Tukes remained at the police station. When he said he was hungry, police officers brought food into the station for Tukes. Finally, in

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2 Although the record does not disclose the total amount of time Tukes was at the police station before he gave consent to the search, he had been interrogated no longer than two hours when he initialed the consent form.

the late afternoon, having been at the police station all day, Tukes was formally placed under arrest and told he was being charged with murder. He invoked his right to counsel.

Tukes was indicted on two counts of first degree murder, one count of armed robbery, and one count of possession of a firearm during the commission of a felony. The state trial court denied his motion to suppress the evidence of the ammunition, pistol, and towel, finding that the "statements were freely and voluntarily given, freely and voluntarily went to the station [sic], that the waiver to search form was signed freely and voluntarily." The court reached no express legal conclusion about whether Tukes's initial statement that he was going to have to get lawyers and Venturi's discouraging response implicated Tukes's right to counsel once he was in custody.

Tukes was convicted on all four counts, and he appealed his conviction to the Third District Court of Appeal, raising the same three issues he urges to this court. The state appellate court affirmed his conviction without opinion. *Tukes v. State,* 507 So.2d 1110 (Fla.Dist.Ct.App.1987)[3]

STONE V. POWELL AND FOURTH AMENDMENT CLAIMS ON COLLATERAL REVIEW

The state argues that this court need not and cannot reach the merits of Tukes's claims relating to the suppression of the evidence because they are fourth amendment claims, which are barred from collateral review by the federal courts if fully and fairly litigated in the state courts. *See Stone v.*

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3 Tukes brought no collateral state proceeding, and none was necessary as Tukes elected to bring in federal habeas corpus only those claims he had presented to the state courts on direct appeal.

Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *see also Agee v. White,* 809 F.2d 1487 (11th Cir. 1987); *Morgan v. Estelle,* 588 F.2d 934 (5th Cir. 1979).[4]

First, we must decide whether Tukes's claims, as they related to the validity of his consent and his right to a lawyer, are fourth amendment claims. Tukes seeks the same remedy for both claims: the suppression of evidence obtained by the police during the consent search of Tukes's house. If Tukes's consent was invalid, the consent search was invalid. Similarly, if the consent was obtained by police after Tukes invoked his right to counsel, the consent and the search conducted under it were invalid because invocation of the right to counsel should cut off further interrogation. In either case, Tukes seeks the same remedy that he would have sought had the police obtained evidence with a defective warrant or no warrant at all. If these claims allege a violation of the fourth amendment, we may not consider them on federal habeas corpus review unless they were not fully and fairly litigated in the state courts.

Coerced Consent

The Supreme Court has identified the fourth and fourteenth amendments as the bulwarks against admission of evidence obtained by the state through coerced consent to a search. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 221-22, 228, 242-43, 93 S.Ct. 2041, 2043, 2045, 2048, 2055-56, 36 L.Ed.2d 854 (1973). Although in this case the fourth amendment concern is raised by way of an objection to the manner in which the police obtained the consent, nevertheless the objection remains one premised on the fourth

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4 The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

amendment, *i.e.*, that the search was unreasonable because it was based on consent that was not knowingly and voluntarily granted.

Significantly, this is not a case where the admission of a confession itself is the source of objection. A coerced confession is unreliable. *Stone v. Powell,* 428 U.S. at 496-97, 96 S.Ct. at 3053 ("A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect's will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based essentially on their lack of reliability.") (Burger, C.J., concurring). Instead, here Tukes seeks the suppression of the fruits of a search. As the Court noted in *Stone v. Powell,* "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." 428 U.S. at 490, 96 S.Ct. at 3050. "The primary justification," the Court stated, "for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." 428 U.S. at 486, 96 S.Ct. at 3048.[5]

The evidence obtained is reliable, and the deterrent effect of suppressing the evidence, according to the Supreme Court, is "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." 428 U.S. at 494, 96 S.Ct. at 3052. In this case, where the complaint of coercion goes to the consent under which a search was made by police, we conclude that the doctrine of

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5 The Court noted that an alternative rationale for the exclusion of evidence obtained in violation of any constitutional right, including that secured by the fourth amendment, is the preservation of the "integrity of the judicial process" 428 U.S. at 485, 96 S.Ct. at 3048. The Court stated, however, that the "force of this justification becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review." *Id.*

Stone v. Powell applies to bar consideration of the claim in federal habeas if the issue has been fully and fairly litigated in the state courts.

Controlling precedent of this circuit and its predecessor supports this result. In one instance, a habeas petitioner attempted to raise a claim, similar to that now urged by Tukes, that his consent to a search was invalid because obtained while he was in a coercive custodial environment without the benefit of *Miranda* warnings. This court held, on the strength of *Stone v. Powell,* that the "matter may not be reexamined" where the state courts gave the claim a "full, fair hearing and consideration to this question." *Hedden v. Wainwright,* 558 F.2d 784, 786 (5th Cir. 1977).

Consent Obtained in Violation of Tukes's Right to Have all Questioning Stop Once the Right to Counsel Was Invoked.

Tukes also contends that his consent was invalid because it was obtained after the police should have ceased questioning him because he had invoked his right to counsel. Arguing that the evidence obtained in the search was the fruit of the poisonous tree of his uncounseled consent, Tukes seeks to suppress the evidence obtained in the search. In effect, Tukes claims that the search was unconstitutional because the consent was invalid as it would not have been obtained had the police honored Tukes's sixth amendment right.

Federal habeas corpus review of this claim is also governed by *Stone v. Powell.* The Supreme Court struck a balance between the exclusionary rule as a prophylactic device to protect fourth amendment values and the reliability and fairness of criminal prosecutions; the reliability of the evidence obtained by the search is not made suspect by the means of obtaining the consent, and there is no reason to believe that the deterrent effect on police conduct is any greater in this context than in the case of simple coercion.

It bears repeating that this claim only involves Tukes's consent to a search; this is not a case where Tukes complains of a confession obtained by overbearing police officers. *Cf. Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 1243 n. 12, 51 L.Ed.2d 424 (1977) (incriminating statements suppressed); 430 U.S. at 414, 97 S.Ct. at 1247 (*Stone v. Powell* issue not raised before Supreme Court) (Powell, J., concurring); *DeAngelo v. Wainwright,* 781 F.2d 1516, 1518-19 (11th Cir.) ("this circuit specifically has refused to extend *Stone* beyond the fourth amendment context"), *cert. denied,* 479 U.S. 953, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986); *Jarrell v. Balkcom,* 735 F.2d 1242, 1251-53 (11th Cir. 1984) (confessions obtained in violation of Miranda not barred from consideration in federal collateral proceedings by *Stone v. Powell* doctrine), *cert. denied,* 471 U.S. 1103, 105 S.Ct. 2331, 85 L.Ed.2d 848 (1985).

Our decision follows the precedent of this circuit in applying *Stone v. Powell.* In *Smith v. Wainwright,* the petitioner alleged that following his arrest, while concededly in custody, he was interrogated by the police after he had been informed of his rights and had invoked his right to counsel. He granted consent to the police to search his truck. In federal habeas corpus, he claimed that the fruits of the search should have been suppressed because his consent was elicited after he invoked his right to counsel. The Eleventh Circuit's predecessor court, noting that the petitioner's "conviction [was] not the result of self-incriminating statements made to police, but the result of physical evidence seized from his truck[,]" stated that a "consent to search is not a self-incriminating statement; '[i]t is not in itself evidence of a testimonial or communicative nature.'" *Smith v. Wainwright,* 581 F.2d 1149, 1152 (5th Cir. 1978) (*quoting United States v. Lemon,* 550 F.2d 467, 472 (9th Cir. 1977)). The court concluded that:

> [t]he failure of the police to halt questioning once Smith mentioned his attorney, then is relevant only with regard to the Fourth Amendment issue of whether Smith's consent to search was voluntarily given. Under *Schneckloth v. Bustamonte,* the failure to cease questioning would be a factor to be considered in "the totality of all [of] the circumstances." The Florida courts considered Smith's request for an attorney in light of the Schneckloth standard. Reconsideration by this court is precisely what Stone forbids.

581 F.2d at 1152 (citations omitted; interpolation in original).

Accordingly, we conclude that the *Stone Powell* bar applies to Tukes's federal habeas corpus claim premised on the fruits of a search conducted under consent elicited after interrogation should have ceased on account of the accused's request for counsel.

Full and Fair Hearing and Consideration in the State Courts

Although the *Stone v. Powell* bar applies to these claims because of their relation to the fourth amendment (as discussed above), the bar is not honored in federal court unless the state courts considered the claims fully and fairly. *Stone v. Powell,* 428 U.S. at 489, 96 S.Ct. at 3050; *Agee v. White,* 809 F.2d at 1490; *Morgan v. Estelle,* 588 F.2d at 940-43; *Caver v. Alabama,* 577 F.2d 1188, 1191-93 (5th Cir. 1978); *Hedden v. Wainwright,* 558 F.2d at 786; *Cf. O'Berry v. Wainwright,* 546 F.2d 1204, 1209-14 (5th Cir.), *cert. denied,* 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977).

For a claim to be fully and fairly considered by the state courts,

> where there are facts in dispute, full and fair consideration requires consideration by the factfinding court, and at least the availability of meaningful appellate review by a higher state court. Where, however, the facts are undisputed, and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate court presented with an undisputed factual record, gives full consideration to defendant's Fourth Amendment claims.

Morgan v. Estelle, 588 F.2d at 941 (quoting *O'Berry v. Wainwright,* 546 F.2d at 1213) (emphasis omitted).

The state trial court gave Tukes a full and fair evidentiary hearing relating both to his coerced consent and invocation of counsel claims. The trial court, however, while finding that his consent was given freely and voluntarily, made no explicit findings as to whether Tukes was in custody at the time he gave his consent, nor did the court provide a finding on whether Tukes had made a request for counsel that should have been honored by the interrogating officer. The state trial court also failed to make a factual finding as to whether Parmenter's deposition or trial testimony should be believed.

The trial court's failure to make explicit findings on matters essential to the fourth amendment issue, combined with the fact that the state appellate court issued only a summary affirmance, precludes a conclusion in this case

that the state provided the meaningful appellate review necessary to erect a *Stone v. Powell* bar to our review of the claim. *See O'Berry* at 1213; *Morgan* at 941.[6]

This conclusion follows logically from this circuit's decision in *Agee v. White*, 809 F.2d 1487 (11th Cir. 1987). In that case the court held that where the state appellate court explicitly addresses only one of petitioner's two fourth amendment claims, *Stone v. Powell* does not bar federal collateral review of the unaddressed fourth amendment claim because it is deemed not to have been fully litigated or considered. *Id.* at 1490 (state court of appeal "ignored" fourth amendment claim). *A fortiori,* where the trial court's findings which are essential to the disposition of the fourth amendment claim are unclear and the state appellate court writes no opinion, we deem the petitioner's fourth amendment claim not to have been fully considered within the meaning of *Stone v. Powell.* Accordingly, we turn to the merits of Tukes's claim that the evidence seized by the police was obtained in violation of his constitutional rights.[7]

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6 We appreciate Judge Roney's observation that a summary disposition can meet the requirements of *Stone. Infra* slip op. at 4798, at ___. Had the trial court's findings been clear in this case, then a summary affirmance might have constituted "meaningful appellate review" as required by *O'Berry* and *Stone. O'Berry* at 1213. *Cf. Tackno v. Blackburn,* 571 F.2d 1383 (5th Cir. 1978) (per curiam) (affirmance by summary disposition can satisfy *Stone v. Powell*). There is no indication in *Tackno* that the trial court's findings were not clear.

7 Where the historical facts were adequately developed in the state trial court, there is no need to remand to the district court to find facts. Furthermore, the factual findings made by the state trial court are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). As we did in *Agee,* we will address the petitioner's claims on the merits as we have determined that *Stone v. Powell* does not bar federal collateral review.

We emphasize that state courts are not required to issue lengthy opinions discoursing on the application of federal constitutional law, nor are they required to pen full opinions in place of summary dispositions. Further, we presume that the issues raised by Tukes in fact were given the careful, judicious, and studied attention of the Florida state Court of Appeal. Nevertheless, for purposes of the *Stone v. Powell* bar, where the trial court failed to make clear findings on essential issues, such a summary affirmance is insufficient to deny the petitioner consideration of the merits of his constitutional claim on federal habeas corpus review.

THE STATIONHOUSE INTERROGATION

Invocation of Right to Counsel

In reliance on *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), Tukes first argues that the interrogation resulting in his consenting to the search of his home was invalid because it violated his right to have all questioning cease once he requested an attorney. Tukes contends that the statement he made at his home before he left with the police officers ("I am going to have to get lawyers.") constituted a request for counsel that should have been honored by the police.[8] The magistrate rejected that argument. The district court adopted the magistrate's recommendation. We also find Tukes's argument without merit as he was not in custody at the time he gave consent to the search.

Once a prisoner requests the assistance of counsel all custodial interrogation must cease until counsel is provided. *Edwards v. Arizona,* 451 U.S. at 485-86, 101 S.Ct. at 1885-86; *cf. Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682,

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8 *See Towne v. Dugger,* 899 F.2d 1104 (11th Cir. 1990) (collecting equivocal invocation of counsel cases).

64 L.Ed.2d 297 (1980) (interrogation defined); *cf. Brewer v. Williams,* 430 U.S. 387, 403-06, 97 S.Ct. 1232, 1241-43, 51 L.Ed.2d 424 (1977) (no waiver of sixth amendment right in responding to "christian burial speech"). Furthermore, once a prisoner in custody requests counsel, he may not be interrogated about additional offenses, even if the interrogator does not have actual notice of the prisoner's prior invocation of his right to counsel. *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 2100-01, 100 L.Ed.2d 704 (1988); *cf. Illinois v. Perkins,* ___ U.S. ___, ___ n. **, 110 S.Ct. 2394, 2399 n. **, 110 L.Ed.2d 243 (1990) (Brennan, J., concurring) (no invocation of right to counsel).

The requirement that the prisoner's invocation of the right to counsel cause the cessation of questioning stems from the nature of custody. Where the prisoner is not in custody, the *Edwards* and *Roberson* concerns are not triggered because the non-custodial defendant is free to refuse to answer police questions, free to leave the police station and go home, and free to seek out and consult a lawyer. Once a suspect is arrested and placed in custody, no longer can he leave the coercive environment engendered by police interrogation. Moreover, the prisoner's ability to obtain counsel is significantly restricted once he is in custody. On the other hand, when the suspect is not subjected to custodial interrogation, the danger of coercion is lessened because the suspect is free to quit the coercive environment.

Whether a person is in custody is measured by "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). Unless a reasonable person would have understood that his freedom of action was curtailed such that he was effectively "in custody," the suspect should not suffer the coercion associated with being under arrest. *Cf. Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam)

(coercive environment of stationhouse interrogation alone does not trigger *Miranda*); *Innis,* 446 U.S. at 299, 100 S.Ct. at 1688-89. In this case, Tukes was not in custody at the time he gave his consent to the search.[9] He voluntarily accompanied the police to the stationhouse, and voluntarily remained there. At the time he consented to the search of his house, his freedom of action had not been restricted; he was free to leave, and no reasonable person would have felt otherwise.[10] Therefore, because Tukes was not in custody, he may not obtain relief under Edwards.[11] Finding that Tukes was not in custody, we need not reach the question of

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9 Tukes' reliance on *People v. Boyer,* 48 Cal.3d 247, 768 P.2d 610, 256 Cal.Rptr. 96 (1989), is misplaced as in that case the suspect was detained when attempting to flee, and once in the stationhouse police evaded the suspect's inquiry as to whether he was under arrest.

10 We note that at the time Tukes consented to the search, he had been at the police station no longer than two hours, and, at that time, had not requested to leave. We also note that he had been read his *Miranda* rights at the time he consented to the search. Although the reading of *Miranda* rights may be considered as some evidence by a reasonable person that he is in custody, in this case, we agree with the magistrate and the district court that Tukes was not in custody and could not reasonably have believed he was.

11 We feel constrained to address an argument raised by the state at oral argument regarding the result of giving *Miranda* warnings. At the stationhouse Tukes was read a waiver of rights form, described as a "Standard Miranda Warning Form." The state contends that because Tukes was not in custody when he was read his *Miranda* warnings, had he invoked his right to counsel the police would have been free to ignore that invocation. The state's position is without merit. If the state were free to tell a suspect that he had the right to an appointed lawyer, but could, while continuing to interrogate, refuse to provide the lawyer on the ground that the suspect was not actually in custody, the suspect would be led to believe that no request for counsel would be honored. The coercive effect of continued interrogation would thus be greatly increased because the suspect would believe that the police "promises" to provide the suspect's constitutional rights were untrustworthy, and that the police would continue to violate those rights as they wished, regardless of assurances to the contrary.

whether his prior equivocal invocation of counsel at his home would have been sufficient to cut off questioning had Tukes been placed in custody.

Involuntary Consent

Tukes's second argument is that the consent was "coerced and involuntary in that Tukes did not understand his true position as sole suspect, did not have knowledge and understanding of constitutional rights when he signed the form." Appellant's pro se brief at 13. In *Schneckloth,* the Court stated that although consent must not be coerced, there is no requirement that consent be an intentional relinquishment of a known right or privilege, as is the case with waiver of certain constitutional rights under *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) and its progeny. *Schneckloth,* 412 U.S. at 243-45, 93 S.Ct. at 2056-57. A court determines the voluntariness of consent by "analyzing all the circumstances of an individual consent ..., [and by] careful sifting of the unique facts and circumstances of each case...."[12] 412 U.S. at 233, 93 S.Ct. at 2050.

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12 The district court adopted the magistrate's report, which concluded that Tukes's voluntariness claim was barred by *Stone v. Powell.* As a result, the district court did not rule or make findings on the voluntariness of Tukes's consent. Where a complete record, fully developed in state court proceedings, is sufficient for proper examination of the claims on federal collateral review, there is no need for an evidentiary hearing in federal court. *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *Douglas v. Wainwright,* 714 F.2d 1532, 1554 (11th Cir.), *cert. granted and opinion vacated for reconsideration,* 468 U.S. 1206, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1983), *panel opinion reinstated on remand,* 739 F.2d 531 (11th Cir. 1984), *cert. denied,* 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985); *Guice v. Fortenberry,* 661 F.2d 496, 500 (5th Cir. 1981) (en banc). Conversely, where the material facts were not developed, the district court should hold an evidentiary hearing.

As the voluntariness issue has been argued on appeal, in the interest of judicial efficiency we adjudicate the claim without remanding. *See Agee,* 809 F.2d at 1490-95.

We find *Schneckloth v. Bustamonte* an instructive starting point. In Schneckloth, the Court held that a suspect need not know of his right to withhold consent in order for the consent to be valid. 412 U.S. at 248-49, 93 S.Ct. at 2059. Similarly, we reject Tukes's contention that police are under an obligation to tell a suspect that he is the sole suspect when they seek consent for a search. To require that a suspect be fully aware of the investigator's view of the degree of the suspect's involvement in the offense would contradict *Schneckloth*.

Nevertheless, in considering the voluntariness of consent, the Court noted that the "traditional definition of voluntariness ... has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statements taken under those conditions has been carefully scrutinized to determine whether it was in fact voluntarily given." 412 U.S. at 248, 93 S.Ct. at 2058 (footnote omitted).[13]

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13 In discussing voluntariness, the *Schneckloth* Court explicitly stated that its voluntariness inquiry in the context of fourth amendment consent took into account "evidence of minimal schooling, low intelligence and the lack of any effective warnings to a person of his rights...." 412 U.S. at 247, 93 S.Ct. at 2058. The Court carefully distinguished between the standard to be applied where full waiver is required and that to be applied to fourth amendment consent. In *Colorado v. Connelly*, the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). Although that statement may be read to apply the same necessary predicate in the fourth amendment consent setting, given the distinction in *Schneckloth*, we do not understand *Colorado v. Connelly* to overturn existing fourth amendment consent jurisprudence; accordingly, we continue to adhere to the interpretation of voluntary consent in the fourth amendment context set forth in the precedents discussed in the text infra.

In *United States v. Mendenhall,* 446 U.S. 544, 558-59, 100 S.Ct. 1870, 1879, 64 L.Ed.2d 497 (1980) (concurred in by five Justices) a twenty-two year old woman who had not finished high school was temporarily detained by two male police officers at an airport because they suspected her of carrying drugs. Eventually she disrobed in the presence of a female officer and drugs were discovered. The Court, in considering whether her consent to the body search was voluntary, looked to her knowledge of a right to refuse as an "especially significant" indicia of whether the consent was knowing and voluntary. The Court also considered the suspect's age and eleventh grade education, considering those factors as sufficient to show that the suspect was "plainly capable of a knowing consent." 446 U.S. at 558, 100 S.Ct. at 1879.

In deciding whether a suspect voluntarily consented to a search the court should consider:

> voluntariness of the defendant's custodial status, the presence of coercive police procedure, the extent and level of the defendant's cooperation with police, the defendant's awareness of his right to refuse to consent to the search, the defendant's education and intelligence, and significantly, the defendant's belief that no incriminating evidence will be found.

United States v. Chemaly, 741 F.2d 1346, 1352 (11th Cir. 1984) (quoting *United States v. Phillips,* 664 F.2d 971, 1023-24 (5th Cir. Unit B Dec. 1981) (footnotes omitted), *reinstated by court sua sponte after vacation for reh'g sub non. United States v. Bacca-Beltran,* 764 F.2d 747 (11th Cir. 1985) (en banc).

In applying these factors, we must place the burden on the state to show that Tukes's consent was voluntary. *Schneckloth,* 412 U.S. at 222, 93 S.Ct. at 2045, 2059 (placing burden on state in collateral proceedings as to consent).

Weighing in favor of concluding that Tukes's consent was voluntary is the following: first, Tukes was not in custody and voluntarily accompanied the police to the stationhouse. Second, there is no evidence of coercive police procedure prior to Tukes's consent to the search. Third, Tukes had already exhibited great willingness to cooperate with the police; indeed, he initially turned over one gun to the police at his house and consented to a search of his car and garage. This pattern of accommodation suggests, although it does not compel, the conclusion that Tukes's subsequent consent was the uncoerced continuation of his baseline approach of dealing with the police.[14]

On the other hand, several other factors weigh against the conclusion that Tukes's consent was voluntary. First, Tukes's education and intelligence were low, and the police had an inkling of Tukes's limitations when he informed them that he could not read or write. Second, the police did not inform Tukes of his right to refuse consent.

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14 Whether or not Tukes believed that incriminating evidence would be found is irrelevant in this case. That factor applies in a case where the suspect freely consents to the search because he believes he has nothing to hide, and is derived from *United States v. Hall*, 565 F.2d 917 (5th Cir. 1978). In *Hall*, a suspect, believing he had "nothing to hide," consented to a search of his car trunk which contained a sawed-off shotgun. The suspect's statement when he gave consent that no incriminating evidence would be found was "a factor pointing to the validity of his consent." 565 F.2d at 920. In this case, there is no evidence either way as to whether or not Tukes believed incriminating evidence would be discovered; accordingly, we do not put this factor on the scales.

Although this case is a close one, we conclude, based on the totality of the circumstances, that Tukes's consent was voluntary and knowing.[15] There was, therefore, no constitutional error in admitting the fruits of the search against him.

ALLEGED EQUAL PROTECTION VIOLATION IN JURY SELECTION

Tukes contends that the prosecutor selected the trial jury in an intentionally discriminatory manner in violation of the fourteenth amendment as interpreted by *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The district court adopted the magistrate's report, which after reviewing the facts, concluded that Tukes had failed to establish a prima facie case under Batson. Batson provides that a prosecutor must rebut charges of racial discrimination in the exercise of peremptory strikes if the defendant can establish a prima facie case. To make a prima facie case under *Batson,* the defendant must show that he or she is a member of a cognizable racial group, that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, and that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." 476 U.S. at 96, 106 S.Ct. at 1723.

Tukes's equal protection challenge fails because the other facts and circumstances demonstrate that the prosecutor was not exercising his peremptory strikes against veniremen on the basis of race. In this case, there were few blacks

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15 We note that but for the state appellate court's summary affirmance we would be precluded from this consideration of the merits under *Stone v. Powell.*

on the entire venire. The state exercised only one peremptory strike against a black; two others were excused for cause. The prosecutor cooperated with defense counsel in attempting to bring more blacks onto the petit jury by agreeing to take black members of the venire out of order ahead of white venire persons. Further the prosecutor agreed not to use a peremptory strike against any additional black juror brought in for voir dire. In light of that fact, we hold that Tukes failed to establish a prima facie case under *Batson*. We therefore affirm the district court.

CONCLUSION

As we conclude that none of Tukes's claims merit relief, we AFFIRM the decision of the district court denying relief.

RONEY, Senior Circuit Judge, specially concurring:

I concur in the result reached by the court and all of the opinion, except that portion which holds that *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), does not apply to any case where the state appellate court has not written an opinion on the Fourth Amendment issue and the state trial court did not set forth specific findings. I doubt if this is a very sound basis for deciding whether the defendant has received a full and fair hearing in the state appellate court. We affirm too many cases without opinion to suggest that a defendant has not received a full and fair hearing of every point asserted on appeal.

If the absence of an opinion makes it uncertain whether the appellate court has considered a particular argument, there being some other avenue to the result, then *Stone v. Powell* would not foreclose federal consideration if the issue turns the case in federal court. But if the defendant had a full opportunity to present the point, did present it, and the point had to be considered in order to reach the result

obtained in the state court, then there should be a presumption that the court did in fact consider the argument and purposely rejected it after full consideration, regardless of the specific findings of the trial court.

As the Court points out, the state trial court gave Tukes a full and fair evidentiary hearing relating both to his coerced consent and invocation of counsel claims. The record reveals that the necessary material historical facts were developed at the suppression hearing, and, therefore, meaningful appellate review could have provided for the legal issues to be fully briefed and argued with the luxury of time for contemplation and researched by counsel. In fact this Court has reviewed this issue on the same record that was before the state appellate court. Tukes raised the same fourth amendment claims before the state court of appeal as he does before this court. This meets the holding in *Stone v. Powell:*

> In sum, we conclude that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force. (footnotes omitted).

428 U.S. at 494-95, 96 S.Ct. at 3052-53.

As the federal courts deal with their caseloads by foregoing opinions reciting every issue argued by the parties, it is counterproductive to burden ourselves with the consideration of Fourth Amendment claims that were in fact fully and fairly considered by a state court and necessarily

rejected by the denial of appellate relief. The state courts are every bit as overloaded as the federal courts, and we should give full recognition to their practices, just as we do to our own.

Since the Fourth Amendment argument is rejected on the merits, whether it is barred from consideration under *Stone v. Powell* does not control the outcome, just as in *Agee v. White*, 809 F.2d 1487 (11th Cir. 1987). But the direction here will impose upon our already overburdened district courts the time-consuming consideration of Fourth Amendment claims which have already received full and fair consideration in the state courts, trial and appellate, a task that *Stone v. Powell* was intended to eliminate.

The United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 88-5685

JOHN T. TUKES,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, Secretary of Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

Filed on December 6, 1990

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 7, 1990, 11th Cir., 1990, ___F.2d___).

Before: KRAVITCH, Circuit Judge, RONEY*, Senior Circuit Judge, and ALDISERT**, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phylis Kravitch
UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third District, sitting by designation.

90-1528

FILED
JUL 1 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD L. DUGGER,

Petitioner,

vs.

MOTION TO PROCEED *IN FORMA PAUPERIS*

JOHN T. TUKES,

Respondent.

_____/

The Respondent, JOHN T. TUKES, by and through his undersigned attorney, pursuant to Rule 39 of this Court, moves to proceed *in forma pauperis*, and in support thereof states that the undersigned counsel was appointed by the Eleventh Circuit Court of Appeal under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6) and had sought and did received in the lower court permission to proceed *in forma pauperis*.

Respectfully submitted by

MICHAEL DODDO, Esquire
Attorney for Petitioner
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Suite 210
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(305) 474-4660 : (800) 940-2099
Florida Bar Number 146541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of June, 1991, a true copy of the foregoing Motion to Proceed *in forma pauperis* was mailed to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050.

MICHAEL DODDO, ESQUIRE

90-1528

No. _____

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD L. DUGGER, Secretary
Florida Department of Corrections,

Petitioner,

vs.

JOHN T. TUKES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

MICHAEL DODDO, ESQUIRE
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Counsel for Respondent

QUESTIONS PRESENTED

WHETHER *STONE V. POWELL*, WHICH PRECLUDES CONSIDERATION OF FOURTH AMENDMENT CLAIMS IN HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C. 2254, REQUIRES AS A PREREQUISITE TO THE BAR AGAINST CONSIDERING FOURTH AMENDMENT CLAIMS, THAT STATE TRIAL COURTS MAKE EXPLICIT FACTUAL FINDINGS, IN ADDITION TO THE PRONOUNCED FINDING REGARDING THE VALIDITY OF THE SEARCH?

WHETHER *STONE V. POWELL* REQUIRES, AS A PREREQUISITE TO THE BAR AGAINST CONSIDERING FOURTH AMENDMENT CLAIMS, THAT STATE APPELLATE COURTS NOT SUMMARILY AFFIRM STATE TRIAL COURT RULINGS ON FOURTH AMENDMENT CLAIMS?

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ARGUMENT

Respondent disagrees with Petitioner's assertion that the decision of the Eleventh Circuit imposes new standards in determining whether a Fourth Amendment claim was fully litigated in the state courts for purposes of *Stone v. Powell*.

Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), held:

> "that where the State has provided as opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial."

Stone v. Powell did not address nor describe what was meant by the concept of "full and fair litigation" apparently since that had been done thirteen years earlier in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Although *Townsend* deals what considerations should properly "govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings", id. at 310, the resolution of that question depends on whether the habeas applicant received a

> "full and fair evidentiary hearing in the state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts."

Id. at 312-313. *Townsend* fully discussed what criteria is to be used in determining whether the state afforded a petitioner a full and fair hearing on the issues presented.

Petitioner's contention for obtaining the Writ of Certiorari is based on the premise that "*Townsend* clearly dispels the notion set forth by the Eleventh Circuit below, that any explicit or express findings from the state trial court

are required in order to satisfy the requisite 'opportunity for full and fair litigation'". (Pet. Br. p. 20) This premise fails for several reasons.

CLEAR FINDINGS NECESSARY

The Eleventh Circuit did not decree that a pre-requisite for full and fair litigation requires specific findings by the state courts. On the contrary, the Eleventh Circuit emphasized

> "that state courts are not required to issue lengthy opinions discoursing on the application of federal constitutional law, nor are they required to pen full opinions in place of summary dispositions. Further, we presume that the issues raised by Tukes in fact were given the careful, judicious, and studied attention of the Florida State Court of Appeal. Nevertheless, for purposes of the *Stone v. Powell* bar, where the trial court failed to make ***clear findings on essential issues***, such a summary affirmance is insufficient to deny the petitioner consideration on federal habeas corpus review." (Emphasis supplied)

Tukes v. Dugger, 911 F.2d 508, 514 (11th Cir. 1990) (Pet. Ap. 37-38) By requiring the state court to make clear its findings on the relevant issues in question, the Eleventh Circuit was following the reasoning set forth in *Stone v. Powell* and *Townsend v. Sain* and is consistent with their holdings.

TOWNSEND CRITERIA

Townsend was convicted of murder and sentenced to death. Prior to and during his trial, he challenged the admission of his confession on the ground

that it was obtained while under the influence of drugs. After a hearing on his motion,

> "[t]he trial judge summarily denied the motion to suppress and later admitted the court reporter's transcription of the confession into evidence. He made no findings of fact and wrote no opinion stating the grounds of his decision. n1"[1]

Townsend v. Sain, Id. at 302. *Townsend* held that:

> "a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

---

[1]The footnote to the *Townsend* trial transcript reads:

"The final defense witness who testified at the motion to suppress was excused. The following then transpired:

"MR. BRANION [a defense attorney]: That's all we have, if the Court please.

"The COURT: The defense rests on this hearing?

"MR. BRANION: Defense rests.

"The COURT: Anything further from the State?

"MR. MCGOVERN: The State rests for the purpose of this hearing, Judge.

"The COURT: Gentlemen, the Court will deny the motion to suppress and admit the statement into evidence and we will proceed with the presentation of the evidence [to the jury]." Id. at 303.

Id. at 312-313.[2]

While discussing the reasoning for the first criteria, *Townsend* emphasized that

> "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. Thus, if no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts. No relevant findings have been made unless the state court decided the constitutional claim tendered by the defendant on the merits. If relief has been denied in prior state collateral proceedings after a hearing but without opinion, it is often likely that the decision is based upon a procedural issue -- that the claim is not collaterally cognizable -- and not on the merits. On the other hand, if the prior state hearing occurred in the course of the original trial -- for example, on a motion to suppress allegedly unlawful evidence, as in the instant case -- it will usually be proper to assume that the claim was rejected on the merits."

Id. at 313-314

Townsend, while explaining the application of the first criteria, wrote:

> "If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because

---

[2]Since *Townsend* raised a Fifth Amendment issue rather than the Fourth Amendment issue which *Stone v. Powell* has limited its scope, Respondent is not suggesting that the 2nd and 4th criteria set forth in *Townsend* would be applicable to a Fourth Amendment habeas review.

of other indicia. In some cases this will be impossible, and the Federal District Court will be compelled to hold a hearing.

Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found t he law or the facts adversely to the petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts. Of course, the possibility of legal error may be eliminated in many situations if the fact finder has articulated the constitutional standards which he has applied. Furthermore, the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence, such as was present in *Rogers v. Richmond*, that there is reason to suspect that an incorrect standard was in fact applied. n10 Thus, if third-degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third-degree methods necessarily produce a coerced confession.

In any event, even if it is clear that the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the "so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration." *Rogers v. Richmond*, supra,

> at 546. See *Frank v. Mangum*, supra, at 347 (Holmes, J., dissenting). Unless the district judge can be reasonably certain that the state trier would have granted relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations. If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied. Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.

Id at 313-316. Respondent has provided a complete quote of *Townsend's* explanation and application of the first criteria to compare with the Eleventh Circuit analysis and application of *Stone v. Powell* to Tukes' issues.

In order to apply *Stone v. Powell*, the Eleventh Circuit wrote,

> "Although the *Stone v. Powell* bar applies to these claims because of their relation to the fourth amendment (as discussed above), the bar is not honored in federal court unless the state courts considered the claims fully and fairly. *Stone v. Powell*, 428 U.S. at 489, 96 S.Ct. at 3050; *Agee v. White*, 809 F.2d at 1490; *Morgan v. Estelle*, 577 F.2d at 940-43; *Caver v. Alabama*, 577 F.2d 1188, 1191-93 (5th Cir. 1978); *Hedden v. Wainwright*, 558 F.2d at 786; *cf. O'Berry v. Wainwright*, 546 F.2d 1204, 1209-14 (5th Cir.), *cert denied*, 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977)."

Tukes v. Dugger, supra. at 513, (Pet. App. 34) In determining whether the claim was "fully and fairly considered by the state courts', the Eleventh Circuit citing *Morgan v. Estelle*, 588 F.2d 934, 941 (5th Cir. 1979) which quoted *O'Berry*, 546 F.2d 1204, 1213 (5th Cir. 1977) as precedent for determining this point, wrote:

> "where there are facts in dispute, full and fair consideration requires consideration by the fact-finding court, and at least the availability of meaningful appellate review by a higher state court. Where, however, the facts are undisputed, and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate curt, presented with an undisputed factual record, gives full consideration to defendant's Fourth Amendment claims."

After careful review of the record and following a similar analysis suggested in *Townsend*, the Eleventh Circuit concluded that there was no meaningful hearing in the State courts because the trial court and the appellate court never made a "clear finding on the issues of whether Tukes' consent for the search was freely and voluntarily given, whether Tukes was in custody when he made a request for an attorney, or whether the interrogating police officer's testimony could be believed. Finding the record void of such findings, but adequate and undisputed factually to make a determination on those issues, the Eleventh Circuit addressed these issues and resolved them in

favor of the State. Such actions were consistent with the holdings and principles of *Stone v. Powell* and *Townsend v. Sine.*

CONCLUSION

Based upon the authorities and argument set forth above, Respondent maintains that Petition should not be granted.

Respectfully submitted

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